

# PART ONE

## THE COMMONWEALTH OF COPYRIGHT: AUSTRALIA, NEW ZEALAND, CANADA

CREATING AND SHAPING THE AUSTRALIAN COPYRIGHT ACT  
1968



# AUSTRALIA'S COPYRIGHT HISTORY

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## PSYCHOLOGY AND NATIONS

Psychology, understood as speculation, not science, helps the historian to make sense of what sometimes seems mysterious in national politics. Within limits of reason and commonsense, we may be justified in considering how the behaviour of nations invites analogy with that of individuals, and extrapolate from human psychology principles to explain political conduct. In the case of Australian legislative history, one psychological theory, in particular, commends itself as a partial explanation for the sometimes sabotaging conduct of Australian politicians. This is the concept of the “locus of control”, proposed in the 1950s by the psychologist Julian Rotter.<sup>2</sup>

It helps to explain plausibly the elements of passivity and subservience in Australian lawmaking whenever it has involved the interests of two powers, Great Britain and the United States. Those elements are so perceptible in the pattern of Australian copyright legislation that Rotter’s theory seems directly to explain why politicians passed copyright laws more accommodating to foreign interests than Australian.

## LOCUS OF CONTROL

Although an academic, Rotter observed patients in therapy and noticed that their psychological health to some extent correlated to their perception of control. He

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<sup>2</sup> Born United States 1916. Spent the majority of his career at the University of Connecticut. In the 1950s helped to develop social learning theory (positive or negative expectations derived from experience influence behavioural choices in ways that may not be rational) – see *Social Learning and Clinical Psychology* 1954.

coined the term “locus of control” to explain why an individual’s sense of autonomy is stronger or weaker.

People who observe that certain behaviour is rewarded, and are permitted to engage in that behaviour, come to believe that their behaviour controls reward. If they experience sufficient positive reinforcement, they may believe that reward is the invariable consequence of action. Their locus of control is internalised: they, so they believe, control their environment.

Those who perceive that action does not result in reward, or that if reward occurs, it does so irrespective of individual initiative, tend to become apathetic or avoidant. They are certain that their actions do not, in any way, determine the outcome of events. They externalise the locus of control. External forces, they believe, shape what happens to them.<sup>3</sup>

The idea of a locus of control is helpful in explaining why nations, like humans, may act boldly or timidly, rashly or with foresight, and pursue strategies that may result in prosperity and stability, or poverty and anomie.<sup>4</sup> In Australia’s case, the body politic, in the widest sense, has tended to externalise the locus of control. Externalising is not invariable. Australia wears the mask of Janus, at once backward-gazing and self-doubting and forward-looking and optimistic.<sup>5</sup>

## AUSTRALIA’S LOCUS

Why externalise? One emotion, scattering or binding the particles of resolution, seems especially to have shaped the European response to the antipodes, and whites, feeling its omnipresence, avoided mention of its name: fear. First settlement in 1788, the primordial act in Australia’s political history, seems to have transmitted to politics

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<sup>3</sup> The locus of control is fixed in childhood, though adults may learn ways to a stronger sense of autonomy. The child who is brought up in a secure predictable way will generally develop a strong sense of autonomy. Its locus of control becomes internal. But a child who experiences fear or rejection, who is treated capriciously or cruelly, may react differently. It may learn to see the external environment as frightening and punitive, inflicting hurt unpredictably. Such a child is likely to externalise the locus of control.

<sup>4</sup> Rotter’s schema is conceptually sweeping and critics have noted that a person’s perception of control may vary according to environment. For example, some people may believe that external events govern their professional wellbeing, yet confidently expect to control the outcome of events occurring in their private lives.

<sup>5</sup> The theme of Australian identity, explored in national literature over more than 150 years, needs little elaboration. Contrasting themes of optimism and tragedy, youth and decay, extroversion and repression, honesty and concealment, heroism and cowardice, progress and ignorance, acceptance and denial, failure and rebirth, run through the continuing discourse on Australian character and nationhood.

something of the emotions of the convicts, and their overseers and masters, who confronted the mysterious hinterland, human threat, and the everyday possibility of violence, failure and starvation.

Colonial policy in the later part of the 19th century absorbed the traces of their reaction and anticipated, in new hinterlands, and the horizon of the ocean, threat and danger. The imperial power remained far away and not very helpful. But the support of that power was indispensable. Australians, who lived “in the brave sunshine” and for whom life seemed “[r]ich, rude, strong-giving”,<sup>6</sup> could not escape their hidden anxiety about a world that could deliver ruin with little warning.

At the end of the 19th century, filled with recorded deeds and unrecorded terrors, colonial politicians faced the necessity for political unity. Though *The Bulletin* and the bush poets sounded the call for the republic, the colonies chose federation and imperial co-option. But long before the creation of the federal commonwealth, politicians responded to their fear of external forces by dependency – a dependency as much psychological as material.<sup>7</sup> Thus, over two centuries, Australia adopted as its protectors Great Britain (19th century until World War II) and the United States (from World War II).<sup>8</sup> In matters of defence, foreign policy and economics, the prescriptions of these two powers powerfully influenced Australian policy.

The requisites of dependency applied with particular force to copyright policy formation.

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<sup>6</sup> Victor J Daley (1858–1905), *In a Wine Cellar*.

<sup>7</sup> The tension caused by the sense of external threat expressed itself most strongly in reactions to the surrounding environment, powerfully expressed by some of the bush poets in the later part of the 19th century. Authority is dangerous, the moneyed class exploits ruthlessly, life is fragile, nature is overwhelming:

*Strangled by thirst and fierce privation-  
That's how the dead men die!  
Out on Moneygrub's farthest station –  
That's how the dead men die!*

Barcroft Boake (1866–1892), *Where the Dead Men Lie*.

<sup>8</sup> When in 1942 General Douglas Macarthur established the Allied Forces' South West Pacific Area headquarters first in Melbourne then in Brisbane, Australia's dependency on the military protection of the United States, protection that the United Kingdom could not offer, became obvious. However, though the control locus passed to the US, and US policy began increasingly to influence Australian, Australia, culturally, and to a significant degree, economically, remained tethered to Britain.

## INTERNALISING THE LOCUS OF CONTROL

Australia, in the field of copyright, has been a follower, though twice a leader. On the occasions of autonomous policymaking, Australia internalised the locus of control, once in 1905, when the new federal parliament passed the first federal copyright legislation, and a second time in 1928, when Australia and New Zealand leadership encouraged the Berne Union to permit members to legislate limitations on the author's broadcasting right.

Why, on these two occasions, were policymakers able to internalise the locus of control? Probably because, for distinct reasons, they felt free from the undertow of fear that creates dependency and mental enclosure. A certain poetry, or perhaps romantic self-confidence, can be discerned in the actions of legislators in 1905. In 1928, policy is shaped by national necessity and the federal government determines that on the question of broadcasting, Australia will, if necessary, stand its ground against the world.

## FEDERATION

Federation in 1901 created the independent Commonwealth of Australia. The radicals of the 1890s, the great decade of political gestation, who anticipated in Australia a sweeping away of the traces of the old order, heard no birdsong in the new creation. The constitutional device, they said, merely consolidated the self-serving stranglehold exerted over the life of Australia by its seedy politicians, moneygrubs, imperial lickspittles and complacent middle class.

Yet federation produced something remarkable and unimagined: a strain of poetic licence in the behaviour of legislators charged with giving life to the commonwealth. Parliamentarians expressed, in a flood of legislation, the poetry of new nationhood. Death attended new life – the nation continued, until 1902, to grieve at the deaths of Australian soldiers in the Boer War<sup>9</sup> – but joy outweighed sorrow. After federation, the blood, travail and striving of colonial Australia could be forgotten, and for a golden moment in its history, one measured in a handful of years, Australia, the nation, enjoyed gilded youth.

In this moment, politicians grew unafraid. They located control within themselves, and chose boldly to step out of the 19th century's shade, and the penumbra of imperial restriction, to express a nation's freedom to be its own arbiter. The poetry of these post-federation years lies in expression of political emancipation. Political chaos supplied one of the clearest signs of psychic emancipation. Many federal politicians

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<sup>9</sup> About 1,000 Australian volunteers died in the conflict between the British colonies in South Africa and the adjoining Dutch republics, the Anglo-Boer war of 1899–1902.

refused to be corralled by party discipline, and they forced frequent government dissolutions.<sup>10</sup>

Then, inevitably, accommodations, failures, and tragedies, small and large, swept in like the tide, and youth vanished. Before the vanishing, in the golden moment, a time when everything seemed possible, federal parliament passed the 1905 Copyright Act. It expressed, in full measure, the spirit of the times. Short, coherent, cogent, wasting no words, and written in style attractive to modern readers – and admirably distant in style from obfuscating 19th century statutes – it is, so far as any law can be, a poetic achievement.

## THE INTERNALISED LOCUS OF CONTROL 1 – THE 1905 COPYRIGHT ACT

In 1905, Australia did not need copyright legislation.<sup>11</sup> Parliamentarians could have waited for the imperial parliament to pass legislation that could be imitated or adopted, and in the meantime left the States to carry on administering copyrights according to their own laws. This was the path of least resistance, or least difficulty. The men of 1905 eschewed this path. The achievements of Australian authors,<sup>12</sup> and the penury of some,<sup>13</sup> urged them to action – a number of senators dilated on the publishers' abuse of monopoly, and their exploitation of writers – though they knew that publishers, predominantly British, would not welcome their initiative.<sup>14</sup>

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<sup>10</sup> Between 1901 and the outbreak of the Great War in 1914, five different federal parties formed eight governments (a ninth taking office a month after the outbreak of war). Five governments (including three in 1904–1905) lasted for less than a year.

<sup>11</sup> The Australian colonies had enacted copyright laws, principally concerned with registration of local publications, in the later part of the 19th century. The British imperial Copyright Act of 1842, and a miscellany of related imperial statutes, governed the subsistence of British copyright material and its distribution throughout the empire, and also regulated, in lieu of conforming local statutes, copyright in books etc in British possessions.

<sup>12</sup> Beginning with the anonymous folk songs and ballads that record life in early Sydney, and continuing with colonial poetry and the bush ballads, publication of Marcus Clarke's great realist novel, *For The Term of His Natural Life*, and the effusion of diverse, distinctively Australian poetry and prose from 1890 onwards, the literature of nineteenth century Australia is remarkable for its originality and deep poetic feeling.

<sup>13</sup> Christopher Brennan, probably the finest Australian poet of the 1890s, and Henry Lawson, were two great figures of Australian literature whose lives were by 1905 disintegrating in alcoholism and poverty.

<sup>14</sup> The British publishers' grip on the Australian market did not constrain the supply of Australian literature, although publishers, controlling supply of British books to the Australian market, practised ruthless price discrimination. Contrary to contemporary assertions by

The Act said NO to the claims of external powers. It said no to provision for import controls, which, for the avoidance of doubt, British publishers would have wanted carried over from the imperial Copyright Act of 1842. It said no to provision for the new categories of copyright works, and the 50 year posthumous term, advocated by the Berne Convention. And it said no to a conception of copyright as more than the 19th century idea of literary property, thus turning away from expanding the scope of copyright to permit copyright holders to control the production of records.

Viewed in this light, the 1905 enactment can be depicted as an expression of recalcitrance. The unwillingness to adopt the all-encompassing categories of “works” promulgated in the Berne Convention, the insistence on retaining as the principal category of protected subject matter, “books”, and the shunning of the idea that copyright extended to so-called “mechanical” reproduction, condemned the legislation to swift obsolescence.

A more accurate way to characterise the legislation is as an act of defiance. The generation of 1905 rejoiced in its volition. The Hansard record shows that in the few years that elapsed between the passing of the 1905 Act and its successor in 1912, party discipline and the interdictions of imperial policy sapped politicians of vitality, independence and forthrightness. Politicians remaining from 1905 were mostly cyphers in the debates of 1912. Senator John Keating, probably the most learned student of copyright law in Australian political history, the sponsor, and possibly author, of the 1905 bill, made a noble and patriotic speech against adoption of import controls. The Government ignored him. The other great figure of 1905, Senator Sir Josiah Symon, kept his silence.

In 1905, however, the Senate engaged in a searching examination of copyright policy that far exceeded in its penetration, and diversity of opinion, any debate, in either chamber, of any Australian parliament, since. Feeling unconstrained by external considerations, politicians concentrated on a principal object: to vest in Australian authors proprietary rights that would, they hoped, allow authors to bargain more effectively with publishers.

They could be called artless for scorning much consideration of the Berne Convention, or the controversy caused by unauthorised recording of musical performances by pianolas or phonographs. On the other hand, their debates showed a sincere concern with ascertaining the rationale of copyright and ensuring that the law created for authors the means to secure economic justice. Subsequent parliamentary debates on these and

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Australian publishers, British control did not preclude Australian publishing (Angus and Robertson, est 1886, and publisher of Henry Lawson, is an example of a highly successful early Australian publisher). Import controls, however, enabled British publishers to regulate the supply of foreign books – to public detriment.



other subjects of the law were usually characterised by shallow reasoning and glib certitude.

The 1905 Copyright Act lasted on the statute books for a mere seven years. It deserves to be remembered as the outcome of the one great act of legislative independence in Australian copyright history.

## THE INTERNALISED LOCUS OF CONTROL 2 – THE 1928 ROME REVISION CONFERENCE

By 1928, the poetry of the immediate post-federation years had long vanished. In 1912, Australia reverted to the policy of imperial dependence, adopting in the Australian Copyright Act of that year the British Copyright Act of 1911. In so doing, it accepted the provisos of the Berne Convention ignored by the legislators of 1905, including the 50 year posthumous term. After 1912, Australia deviated only once, in 1928, from its policy of following the normative examples of the United Kingdom, the Berne Convention (which Britain studiously implemented) and the United States.

The Australian federal parliament of 1928 differed in spirit from its counterpart of 1905. Now the grim factionalism of two party politics (Nationalist and Labor) made impossible the creative anarchy of post-federation, when Protectionist, Labour,<sup>15</sup> Free Trade, and, later, Commonwealth Liberal parties vied for office. Australia's role as a dominion cooperating in the machinery of the British Empire, and its tenderness to the welfare and concerns of the United Kingdom, betrayed the attitude of the obedient child to its distant mother. The locus of control, internalised for a few short years, reposed once again in the bosom of that mother.

For a fleeting period in 1928, Australia snatched back power to make copyright policy for its own sake. This brief reprisal of the 1905 spirit proved too much for the Government, and the control locus soon returned to the imperial power. In the meantime, Australian diplomacy achieved a great deal. The reason for the departure from policy conformism is that the Berne Union's broadcasting policy threatened to wreck the Australian Government's strategy for ensuring the spread of radio broadcasting across the nation. The Government considered the danger to Australia's national interest to be grave and definite. So Australia shrugged off docility. Like the child suddenly aware that self-extinction is the price of automatic obedience, it acted, with decision and acumen, to secure its own interest.

The Berne Union's 1928 Rome revision conference considered, among other things, amending the Convention to vest in authors control over the broadcasting of original works. This proposed extension of authors' rights threatened the policy of countries

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<sup>15</sup> The Australian Labor Party changed the spelling of its name from 'Labour' to 'Labor' in 1912.

like Australia, which regarded the spread of radio dissemination as a critical element in unifying disparate, often isolated, populations, stretched around and across a vast continent.

If the authors' proposed broadcasting right were adopted in the Convention text without limitation, authors could, thought some, hold broadcasters to ransom. Australian radio stations, embroiled in argument with the Australasian Performing Right Association over fees for playing music, lobbied furiously. If no means existed for restraining APRA, they said, they could be held to ransom, and go to the wall. If APRA, on behalf of copyright owners, demanded inordinate fees for the broadcasting of music, the development in Australia of radio broadcasting could be severely retarded.

The federal Attorney General, John Latham, entertained no doubt, and he instructed the Australian delegate to the Rome conference, Sir Harrison Moore, to resist the conference resolution to adopt an unfettered broadcasting right. Great Britain, while not unsympathetic to the Australian position, offered no particular assistance, and might have voted for the proposition supported by civil law countries. Moore, and his New Zealand colleague, Samuel Raymond (as they pointed out proudly in their conference reports) refused to accept the consensus in favour of an unrestricted broadcasting right.

Eventually, the Union, which depended on unanimity for the passage of resolutions, relented. Article 11 *bis* (2) of the Convention permitted Union members to "determine the conditions under which the ... [broadcasting right] may be exercised ..." The Australian legislature could thus enact copyright laws imposing certain limitations on the way APRA exercised the performing right. Ultimately, this concession resulted in the provisions of the 1968 Copyright Act establishing the Copyright Tribunal.

As Moore stated in his report, "the interests of the public – that great body of purchasers of copyright wares – were vigorously voiced by the Dominions for the first time in the history of the International Copyright Conferences."

## THE EXTERNALISED LOCUS OF CONTROL

After parliament passed the 1905 Act, Australian governments continued, until 1910, to determine copyright policy from the sole perspective of the Australian interest. Then Westminster turned the screws. In 1909, the British Board of Trade appointed a copyright review committee to consider whether to accept in British law the Berne Convention, amended in Berlin in 1908. The Gorell Committee replied in the

affirmative,<sup>16</sup> and the Board of Trade oversaw drafting of a copyright bill implementing the Berne provisos. Committed to legislating, the British government turned its attention to securing uniform legislation throughout the empire. Government policymakers had no wish for dominions like Australia and Canada to pursue independent policy. A patchwork of copyright regulations, they reasoned, could only prove inimical to the policy of imperial cooperation, and the preferential trade system on which it was based.

In 1910, at the imperial copyright conference in London, Sydney Buxton, the President of the Board of Trade, made Britain's wishes plain to the assembled dominions. For reasons of "efficiency" and "the imperial connection", the imperial government considered it "highly important to attain as great a degree of uniformity as is reasonably practicable among the principal nations of the world with regard to international copyright." The coda of Buxton's words was clear: commit to legislating in conformity with the imperial copyright bill circulated to conference delegates.

Even so, Australia at first showed no inclination to accept a central precept of the Berne consensus, the 50 year posthumous term, which British publishers embraced enthusiastically. The federal Attorney General, Billy Hughes, instructed Australia's representative at the imperial conference to resist pressure to accept the 50 year term, adding that a long posthumous term benefitted British publishers but conferred "nil" benefit on Australia.

The Prime Minister, Alfred Deakin, also cabled instructions to reject the 50 year posthumous term. Deakin promptly lost office (a month before the conference took place) and his replacement, Andrew Fisher, cabled that his government must examine the British copyright bill before any commitments could be made. Remarkably, Australia's representative at the conference, Lord Tennyson,<sup>17</sup> an Englishman, and a seeming partisan for the British interest, disregarded government communications. A former governor-general of Australia, he treated federal government communications with condescension and pursued the policy he declared best suited to Australia's interest: that of accepting the resolutions of the conference, including British ratification of the Convention, and the preparation of imperial legislation that could be adopted by all British possessions. The insistence of Australia's first law officer, and its prime minister, that Australia retain the limited copyright term set out in the 1905 Act came to nought, and no Australian politician criticised Tennyson for his wilfulness.

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<sup>16</sup> Although it rejected enactment of a compulsory licence, a measure countenanced by the revised Convention.

<sup>17</sup> Hallam Tennyson, son of the great Victorian poet Alfred, Lord Tennyson. Governor of South Australia 1899–1902, Governor-General Australia 1903–1904.

The outcome of the imperial copyright conference, which substantially committed Australia to legislate in conformity with new imperial legislation, indicated psychological shift in Australian policy. The unwillingness to discipline Tennyson, indeed the peculiar choice of Tennyson as Australia's representative,<sup>18</sup> the ready acquiescence to copyright policy that, in the words of Billy Hughes, "is of greater relative importance in Great Britain than it is in Australia",<sup>19</sup> betokened return to the tractability that subsumed national interest in that of the perceived external protector.

The change is not surprising. In Australian copyright history, the internalised control locus is anomalous. Externalisation is normal. Once federation's golden moment vanished, and the machinery of politics began to grind predictably, as politicians defined national development and imperial cooperation as inseparable objects, reversion to psychic traits of the 19th century occurred.

The excitement and creative possibility of federation's early years absorbed politicians in nation-building, and they forgot old fears. Australia's dark ontology could be forgotten, but only for a while. Politicians discovered that, in some ways, they forged independence contingently. Seemingly every aspect of Australian life, from railways to sheep stations, relied, in some portion, on British investment. Prosperity depended, to a large extent, on imperial markets, chiefly those of the mother country, and safe passage of cargo guaranteed by the arms and diplomacy of Great Britain.

The recurrence of fear need not have prevented politicians from recognising that while Australian policy must take account of external factors – and external powers – national interest could yet be separated from, and preferred to, foreign. Acceptance of Westminster's primacy in imperial governance need not have entirely stymied the rush of free-wheeling enthusiasm launched by federation. Politicians, presented with the *fait accompli* of imperial copyright conference resolutions, could yet have fought for, and won, important legislative concessions that benefitted the Australian public. But after 1910, they retreated.

The old fear of annihilation, by nature or humankind, sublimated yet fixed, steered politicians away from the awe-inspiring prospect of genuine self-determination. A person may outwardly display the signs of vitality and resolution and still exist as the mental bondservant of another, crippled by belief that survival without the other is impossible. So it was with Australia, young and free, in the words of the national

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<sup>18</sup> The former prime minister George Reid became high commissioner in London in 1910. He took some part in debate over the 1905 copyright bill in the House of Representatives and would probably have suited the role of representative better than Tennyson. Keating or Symon could perhaps have attended the conference as Australia's representative. They were still sitting members of parliament but neither was a member of the governing party.

<sup>19</sup> Hughes spoke of the 50 year posthumous term.

anthem written in 1878, yet stepping off the path of adventure and choosing instead to follow that of conformity, certitude, safety – and enclosure.

## THE 1912 COPYRIGHT ACT

Great Britain enacted new copyright legislation at the close of 1911 and issued a polite warning to Australia. Any Australian legislation, said a British cable on 1 December, must adopt the provisions of the imperial act (which implemented the amended Berne Convention) or otherwise Australian copyright would no longer be recognised in Britain or the empire. A flickering manifestation of independent spirit prompted the British statement. The Labour Government, perhaps smarting from Tennyson's disobedience in the previous year, drafted a copyright bill in 1911 to give effect to the imperial conference resolutions, but its haste probably indicated a desire for expedition rather than mischief making. At any rate, in 1912, the Government issued a new copyright bill adopting the imperial act of 1911. The bill attracted little critical comment from either house. Legislators concerned themselves mostly with matters of machinery and passed over the substantive portions of the legislation.

The Australian Copyright Act of 1912 adopted the whole of the British Copyright Act of 1911, the latter placed in a schedule to the Australian legislation, offending a number of politicians who expressed dislike of inferior British parliamentary drafting. John Keating called the British legislation "unintelligible to the ordinary person." Together, the statutes swept away the brief legacy of 1905. Keating objected to one part only of the disavowal of legislation with which his name is associated.

He understood, and supported, he said, the passing of new legislation that brought Australia into the community of Berne nations, and brought to authors the benefit of international uniformity in copyright rules. However, he disagreed vehemently with the provision creating import controls, a proviso absent from the 1905 Act.

Import control allowed the copyright holder to control the distribution of copyright material in Australia. Their provenance lay in the 18th century battle against French and Irish book pirates, and principally they benefitted British book and music publishers. They relied on copyright legislation to prevent Australian retailers (or wholesalers) from buying overseas remaindered legitimate copies of British books (or sheet music), and importing them into Australia for sale at prices that undercut the publishers.

The British Copyright Act permitted dominions like Australia to adopt the legislation subject to modifications relating to "procedures and remedies" or "necessary to adapt this Act to the circumstances of the dominion."<sup>20</sup> The notoriously poor drafting of the

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<sup>20</sup> *Copyright Act 1911*, section 25(1).

1911 Act here created doubt about exactly in what circumstances Australia could modify the terms of the imperial legislation, and the Australian parliament allayed uncertainty by accepting the legislation unchanged.

Keating, though, could not be mollified. Joined by Senator Joseph Vardon, he insisted, that import controls must be resisted, as they had been ignored in 1905. In words that resound in the present day, he demanded that the public interest be satisfied. “We have to realise that copyright legislation affects not merely publishers, printers, and authors, but readers ... the whole community.” Keating called section 10 of the 1911 Act, which established controls, “a big blackmailing clause”, and he added that, “in adopting this legislation, we are adopting British legislation, and ... Great Britain is a totally different country from Australia.”<sup>21</sup>

Keating returned to the theme of blackmail, anticipating modern arguments against parallel importation restrictions. Controls, he reiterated, “open the door to blackmail.” They “give a monopoly to a man who chooses to buy the copyright of a song, as far as Australia is concerned.”

In the lower house, William Archibald, a Labor MP, and the man responsible for the creation of free libraries in towns, said that section 10 would do “an injustice ... to people in Australia.” David Gordon, a member of the ruling Commonwealth Liberal party, submitted that, “we should legislate according to Australian requirements”. Section 10, he said, “is all very well from the British aspect, but from the Australian standpoint, it seems to me that we ought to consider the position in this part of the world, and modify the law to suit our own purposes, rather than to suit those of persons who are copyrighting in Great Britain.”<sup>22</sup>

These voices of dissent, arguing for the Australian interest, were ignored. A new Australian Copyright Act, superseding the legislation of 1905, and accepting in Australian law, the British Copyright Act of 1911, passed in 1912. The new Act introduced a 50 year posthumous term, the class of “works” recognised in the Berne Convention, the compulsory licence for recording music, and classes of fair dealing. Copyright applied to the production or reproduction of works in any material form, including recording or cinematograph film. Import controls placed in the hands of copyright holders control over the supply of all legitimate product.

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<sup>21</sup> He continued that, “we are adopting a provision made in the United Kingdom to meet conditions with respect to importation of pirated copies, which are totally dissimilar from those that apply in Australia.”

<sup>22</sup> Archibald added that legislators, “should not make away with our rights for the sake of securing uniformity.”

## THE INTERWAR YEARS

Allowing for the unusual circumstance that Britain ratified the Berne Convention on Australia's behalf,<sup>23</sup> and thus technically only imperial legislation formally implemented the convention, Australia's adoption of the 1911 Act emphasised the nation's rediscovered psychological subsidiarity. That for 56 years, a self-directed British legal instrument constituted the substance of Australian copyright legislation, reflects the external locus of control.

The British Copyright Act of 1911 made Australia safe for British business in three ways:

- import controls enabled British publishers and record companies to control the supply of all licit copyright material to the Australian market
- control, by the Australasian Performing Right Association, of the public performance right, resulted in repatriation to Britain of the bulk of music performance fees collected by APRA
- copyright in records enabled British gramophone companies, which by the early 1930s monopolised Australian record manufacture, to regulate production and supply.

Except in the case of import controls, designed to facilitate the practice of ruthless price discrimination by British publishers, British commercial control in Australia did not result from legislative plotting to subordinate Australian markets to British copyright interests. In 1911, no-one foresaw the rise of radio broadcasting and its extraordinary effect on the increase in the commercial value of the public performance right. However, imperial copyright legislation vested in the publishing and recording industries, by species of copyright control, great economic power. These industries were made up of British companies, and as soon as peace descended on Europe, they exerted control over Australian markets for copyright material.

The history of Australian copyright politicking in the interwar period is complex, and it is sufficient, for present purposes, to record that by accepting imperial legislation, and the obligation to honour the unfolding program of authors' rights in the Berne Convention (and the evolving system of neighbouring rights), Australia's copyright perspective, already governed by the imperial perspective, became fixed.

Considerations of international law and imperial comity now made impossible significant retreat from the legal position determined, at root, by psychic dependency. Even though Australia the nation, seen independently from external considerations, benefitted little from the lengthy copyright term, or a number of other stipulations of

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<sup>23</sup> Australia became an independent member of the Berne Union in 1928. Until then British accessions or ratifications were done in its own right and on behalf of its imperial possessions.

copyright law, and not at all from import controls, politicians could not contemplate the frightful possibility of separation. The desire for attachment perhaps explains the otherwise mysterious absence of critical thought in Australian policymaking from this time forward.

Though policymakers had plenty to object to, from now on, by and large, they confined themselves to discussing the mechanics of international law and its reception into Australian. They were not disturbed that the structure of the law primarily benefitted a foreign economic interest. They reacted to copyright disputes that broke out frequently between 1920 and 1940, as if the underlying law, which buttressed the arguments of British copyright owners against obstacles to revenue-making, reflected deeper natural necessity.

Between the wars, two copyright-related phenomena disturbed the economic peace. The first, starting in the mid-1920s involved APRA's collection of fees for the public performance of music. Radio broadcasters, instruments of unprecedented mass communication, beneficiaries of advertising revenues and government subsidy, quickly became APRA's favourite collecting source. The second concerned the bitter dispute between commercial radio broadcasters,<sup>24</sup> orchestrated from EMI headquarters in London, which, in the early 1930s, resulted in Australian record companies banning radio stations from playing their records.

Government reacted by conciliation. The Royal Commission on Performing Rights, which reported in 1933, examined the first dispute, and became embroiled in the second. The Royal Commissioner, Sir William Owen, recommended compulsory arbitration as the suitable procedure for resolving performing right disputes,<sup>25</sup> and equivocated on the record companies' claim for a record performing right (on which basis they asserted the right to ban the playing of their records). Owen saw that such a right, if accepted, would lead to necessity to pay two public performance fees but he said the legislature must determine the question.

Reform, however, proved too much. Government ignored the royal commission report and life went on as before. APRA, described as a "dragon devastating the

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<sup>24</sup> Australia, unusually, established in the early 1920s a broadcasting system split between public broadcasters supported by licence fees, and private broadcasters supported by advertising revenue. By the mid 1930s public broadcasters were consolidated under the control of the Australian Broadcasting Corporation. Public and private broadcasters devoted a large proportion of airtime to the playing of music.

<sup>25</sup> He also recommended, among other things, that APRA publicly disclose non-collection income, public performance fees, distributions, its music repertoire. Government allowed the report to lapse. Over 30 years later, the Coalition Government adopted the first recommendation, for the establishment of an arbitration tribunal, establishing in the *Copyright Act 1968* the Copyright Tribunal.



countryside”<sup>26</sup> continued to court unpopularity by demanding progressively larger public performance fees from the ABC and commercial radio stations. Legally, the broadcasters could do nothing to stop the devastation. The record companies, whose counsel at the royal commission called commercial radio, “a noisome weed”, continued – with diminishing interest – their war against radio.

The “gramophone lion”, so-called by an interested member of the federal attorney-general’s department, blamed the precipitate fall in record sales during the great depression on radio broadcasting of music. In the United States and United Kingdom, the recording industry reacted by instituting bans on the playing of their records. In the UK, EMI asserted that the 1911 Copyright Act conferred on record producers the right to control the public performance of their records, and to general amazement, the English High Court upheld this argument in 1933.<sup>27</sup>

In Australia, Gramophone Company, Parlophone Company, and Columbia Gramophone Company, sustained heavy losses from record sales from the mid 1920s. After their UK parent companies merged in 1931, they constituted the monopoly supplier of records in Australia. Their ban on broadcasting of records thus posed a grave threat to radio stations but over time the record industry saw, in its activities and those of broadcasters, confluence of interest. As EMI eventually realised, broadcasting stimulated, rather than undermined, sales.

By 1940, government, because of difficulty, distraction, and simple ineptitude, had failed in its task of conciliation. Copyright factions were antagonistic but they lived with their differences. The Australian interest in the wide dissemination, via radio and other means, of copyright material could not be said to be a foremost consideration of government policy. Reform would have to wait.

## THE EXTERNAL LOCUS STRENGTHENED AND BROADENED

Reform came, slowly, and once again, Australia followed the British lead. Spurred by continued commercial dispute over performing rights, and importuning for recognition of a sports performing right,<sup>28</sup> the British Government commissioned a committee to review the copyright law. The Gregory committee reported in 1952,

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<sup>26</sup> By Purcell, barrister for the Cinematograph Exhibitors’ Association at the royal commission.

<sup>27</sup> *Gramophone Company Ltd v Stephen Cawardine & Co* [1934] 1 Ch 450.

<sup>28</sup> The Association for the Protection of Copyright in Sports (renamed the Sports Promoters’ Association) lobbied government hard in the late 1940s and early 1950s, for recognition of copyright in sporting spectacles. Though the sports promoters often did not precisely articulate the species of right sought, they wanted the legal right to control the broadcasting of sporting fixtures. In 1952 they organised a ban on television broadcasting of major events. In the same year, the Gregory Committee rejected the proposal for a sporting performing right.

recommending implementation of the latest amendment to the Berne convention,<sup>29</sup> and reordering of the copyright legislation to recognise analogous copyrights of the recording and radio and television broadcasting industries.

Australia followed by assembling the Spicer committee in 1958 to review the findings of the Gregory committee and the implementing legislation.<sup>30</sup> The committee largely adopted the conclusions of its British counterpart, and recommended new legislation, which, when it finally came in 1968, adopted the structure, categories and terminology of the British legislation.

The Australian Copyright Act of 1968 thus began its life as an analogue of the British Act of 1956. In its present incarnation, multiplied in length about sevenfold, it sets out complex procedures for collecting fees for use of copyright material, as well as expressing imperatives of international law and a bilateral trade agreement with the United States.

Most informed Australians would regard the 1968 Copyright Act as an instrument nicely calculated to enable Australia to benefit from the principle of international mutuality, while supposedly “balancing”<sup>31</sup> the interest of copyright owners in profit, and the public in dissemination. The Act is thus viewed as a beneficial compact, the product of something more than mortal wisdom, uncovered by the exegesis of enlightened foreign lawmakers, and so obviously giving effect to the universal moral law, that reception in Australian law must occur automatically.

Another view, drawn from consideration of Australian copyright history, suggests itself. If the locus of control is hard to shift, if embedded psychologies live in nations through centuries, we have no reason to expect, in the future, more freedom of information than that allowed us, in the century past, by the proprietary interest collectives of larger powers. Two young Canadian scholars, Sara Bannerman ([sarabannerman.blogspot.com](http://sarabannerman.blogspot.com)) and Blayne Haggart ([blaynehaggart.blogspot.com](http://blaynehaggart.blogspot.com)), neither lawyers, are drawing attention to a way in which Australia, among other nations, might free itself from psychological subsidiarity, and emancipate its policy for practical benefit. They suggest that even within the constraints of international law and free trade agreements, so-called “middle powers” like Australia and Canada, and less developed countries, can create something like copyright freedom, or more freedom than before, by identifying common interests and interpreting rules to encourage, rather than restrict, information freedom. Theirs is a pragmatic conception of freedom, but it offers more encouragement than the principle of “balance of

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<sup>29</sup> At a conference in Brussels.

<sup>30</sup> The British *Copyright Act 1956*.

<sup>31</sup> The first reference to a “balance of interests” – now repeated ad nauseum to be the function of copyright law – that I noticed in official literature is in the 1959 report of the Spicer Committee.

interests”, which, if the last century is a guide, may encourage more obedience to external restrictions that inhibit rather than emancipate the supply of information.